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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**



In the Matter of

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| Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation | ) | CS Docket No. 95-174 |
| Uniform Rate-Setting Methodology | ) | |

**COMMENTS OF COLE, RAYWID & BRAVERMAN**



**COLE, RAYWID & BRAVERMAN, L.L.P.**
1919 Pennsylvania Avenue, NW
Suite 200
Washington, D.C. 20006
(202) 659-9750

February 12, 1996

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## SUMMARY

Cole, Raywid & Braverman ("CR&B") supports the Commission's efforts to improve the existing rules governing cable rate regulation. The establishment of uniform regional rates makes sense for cable operators, cable subscribers, and cable regulators. If the current regulatory initiative is to have any real impact, however, the rules adopted will need to be simple and flexible enough to accommodate a wide array of factual scenarios. Accordingly, the Commission should afford cable operators broad discretion to determine the scope of uniform service rates and the method through which such rates are implemented. In particular, cable operators must have discretion to determine whether, and to what extent, BST rates will be discounted as part of the rate "averaging" process.

The Commission should simplify the review process to minimize the regulatory lag that might otherwise impede the establishment of uniform regional rates. It should also ensure that operators are able to pass through franchise-related costs to ensure local accountability.

The Telecommunications Act of 1996 reveals a new interest in loosening cable rate regulation. This proceeding is consistent with that objective. The Commission should act promptly to effectuate a sensible regulatory proposal with a minimum of administrative complications.

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## COMMENTS OF COLE, RAYWID & BRAVERMAN

The law firm of Cole, Raywid & Braverman ("CR&B") hereby submits its comments on the Commission's November 29, 1995, *Notice of Proposed Rulemaking* ("*NPRM*") in the above-referenced proceeding. CR&B files these comments on behalf of the cable television operators and state cable television associations identified in Attachment A hereto.

### I. THE COMMISSION SHOULD FACILITATE IMPLEMENTATION OF UNIFORM REGIONAL RATES.

CR&B applauds the Commission's efforts to improve the existing rules governing cable rate regulation. The current scheme, with its franchise-specific emphasis, imposes an unnecessary burden on all affected parties. As the *NPRM* correctly notes, the ability to offer uniform rates across local jurisdictional boundaries would benefit both cable operators and cable subscribers. The former would save on administrative and marketing costs, and the latter would avoid unnecessary confusion. Local franchising authorities and the

Commission also would benefit, as consolidated rate filings ultimately would lighten their regulatory load. The *NPRM*, then, is consistent with the 1992 Cable Act's requirement that the Commission "seek to reduce administrative burdens on subscribers, cable operators, franchising authorities, and the Commission." 47 U.S.C. § 543(b)(2)(A). It is also consistent with the interest expressed by Congress in the recently enacted Telecommunications Act of 1996 in loosening cable rate regulation.

CR&B is particularly enthusiastic about the Commission's proposal, because it promises to leave cable rate regulation more responsive to the realities of the marketplace. Effective marketing is frustrated by a lack of consistent local pricing, yet the current regulations frequently compel cable operators to charge different rates in adjacent communities. In an era marked by ownership consolidation, system clustering, and intensifying competition, a regulatory framework that impedes the establishment of uniform local rates is increasingly troubling. Establishing uniform regional rates makes good common sense, and the cable industry deserves the opportunity to do so. The industry's marketing options should not be frustrated by a slavish preoccupation with minor historic discrepancies in local rates and/or benchmark factors.

The wisdom of the Commission's underlying objective in this proceeding is beyond dispute. Of course, as has often been the case with cable rate regulation, the "devil is in the details." But the Commission should not be dissuaded. In fact, it should commit itself to fashioning a sensible regulatory system that accommodates a wide variety of local scenarios. This will best be accomplished by minimizing accounting complications and

maximizing user flexibility. A regime that is too complex or too rigid will have little appeal to cable operators and, thus, undermine the Commission's efforts.

CR&B encourages the Commission to create a regulatory framework that will facilitate widespread operator participation. Where specific eligibility restrictions are imposed, the Commission should look favorably on waiver requests. The Commission's recent experience negotiating rate settlements and social contracts with major MSOs has demonstrated the benefits of working with the cable industry to reach practical solutions that benefit consumers, regulators, and operators alike. The current rulemaking will be successful only if it incorporates a similar emphasis on practical results and accommodates the wide variety of rapidly changing circumstances faced by the nation's cable operators.

## II. CABLE OPERATORS SHOULD HAVE BROAD DISCRETION TO DETERMINE THE SCOPE OF UNIFORM RATES.

The *NPRM* raises a series of questions regarding the appropriate scope of the proposed regulations. In each instance, CR&B urges the Commission to avoid establishing unnecessary regulatory hurdles. Cable operators should be left with the broadest possible implementing discretion.

### A. Operators Should Have Broad Discretion To Combine Multiple Systems In A Single Uniform Rate Zone.

The *NPRM* first suggests that operators be allowed to "average" or "blend" rates across a given region, even if subscribers are served by a collection of separate systems. The proposal is a sensible one, for there is no reason to limit use of the uniform rate option to cases where a cable company has already consolidated regional operations into a single,

large system. Allowing operators to blend rates across multiple systems is precisely the sort of accommodation necessary to ensure the viability of the uniform rate option.

### B. Operators Should Have Broad Discretion To Define The Maximum Size Of A Uniform Rate Zone.

The *NPRM* next asks whether the Commission should define the maximum size of a regional rate zone. CR&B does not believe such a restriction is necessary. To the extent the Commission feels compelled to establish an outer limit, however, CR&B agrees that use of Arbitron's existing ADI territories is a sensible choice. These territories reflect existing advertising markets and should typically allow operators to capture the benefits sought by this proceeding. But rigid adherence to an ADI approach could be counterproductive. There are compelling, "real world" reasons to allow uniform rate regions to encompass more than one ADI. This would be particularly true where a single cable system happens to cross an ADI boundary. These cases must be accommodated. Rather than mandate a cumbersome waiver process for all these cases, CR&B suggests that the Commission leave cable operators with discretion to aggregate unilaterally as many as three ADIs into a single uniform rate region. This simple rule would avoid a large percentage of cases where a single ADI limitation runs counter to the objectives underlying this proceeding, and it would do so without any adverse consequences. Again, the Commission should avoid placing unnecessary restrictions on operator discretion, particularly where there is no discernable risk to consumers.

### C. Cable Operators Should Have Broad Discretion To Determine The Minimum Size Of A Uniform Rate Zone.

Given the vast array of rate scenarios confronting the cable industry, the Commission should clarify now that the new regulatory option need **not** be invoked on an "all or nothing" basis. Operators certainly should be allowed to establish a uniform rate zone smaller than an entire ADI. An operator might decide, for example, to establish several rate zones within a single ADI. Indeed, the most likely use of the uniform rate option in the near future would be to standardize rates among neighboring communities on a system-by-system basis. All of the communities served by a particular system would then have the same standardized rate, but each separate system operated by the cable company within that ADI still could have a different rate. An operator also might elect to leave a particular community entirely outside any uniform rate group. Although this sort of flexibility potentially sacrifices some of the marketing benefits inherent to an ADI-wide rate election, without it, the Commission is likely to find that very few operators ever exercise the new option. The Commission should resist the temptation to artificially restrain operator discretion in this area. Simple mathematics (inherent to the "averaging" process) will preclude gerrymandering uniform rate zones to "scam" rate regulation. An operator's decision in this regard must be presumed to reflect *bona fide* marketing considerations.

### D. Cable Operators Should Have Broad Discretion To Combine Regulated And Unregulated Communities In A Single Uniform Rate Zone.

The *NPRM* proposes allowing operators to establish a uniform rate encompassing both regulated and unregulated communities. CR&B supports this proposal and agrees it would "further enhance[] operators' flexibility in establishing uniform rates . . . [and]

should increase . . . operators' regulatory certainty. *NPRM* at ¶ 17. Under current rules, operators are likely to have different rates in adjoining communities depending on whether BST and/or CPST regulation were invoked in a particular jurisdiction. The resulting rate "checkerboard" is precisely the situation the *NPRM* is designed to combat.

Although regulated communities theoretically could object to blending together regulated and unregulated rates, the Commission has already recognized that a decision by local franchising authorities and subscribers not to invoke rate regulation is, at this point, controlling evidence of the reasonableness of the existing rates. *See Thirteenth Order on Reconsideration,* MM Docket No. 92-266, FCC 95-307, at ¶ 164 (Sept. 24, 1995). Accordingly, cable operators should be allowed to blend together a variety of regulated and unregulated rates, as both are *per se* reasonable.[1]

The switch to uniform rates accomplished under the new rules must, of course, be "revenue neutral." This essentially means that participating operators could blend together the higher of their "current actual" rates and their "maximum permitted" rate in each relevant community. Operators should not be required to forego revenue they would be entitled to collect under the existing franchise-specific regulatory model in order to participate in the uniform rate option.

CR&B supports the Commission's suggestion that operators be allowed "to base uniform rates in part on data from unregulated areas only if such uniform rates also are

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[1] Similar reasoning dictates that operators be allowed to combine "benchmark" and "cost-of-service" communities.

charged in the unregulated area." *Id.*[2] Although the proposal effectively extends rate regulation into heretofore unregulated communities, it also promises to foreclose any possible argument that cable operators are trying to exploit the regulatory option unfairly.

The Commission should emphasize, however, that operators may choose which unregulated communities, if any, will be included in compiling the local average. Operators sometimes may choose to incorporate absolutely every local community into their uniform rate zone, and they sometimes may chose to exclude certain communities. There is no logical reason why these decisions should be subjected to second-guessing by regulatory authorities. Excluded communities will be in precisely the same position they were in prior to the uniform rate election, and included communities will be protected because operators will be doing nothing more than blending together rates that are *per se* reasonable.

### E. Cable Operators Should Have Broad Discretion to Determine Which Service Tiers Are Subject to a Uniform Rate.

Not only should operators be able to decide which communities will be included in a uniform rate zone, they also should be able to decide which service tiers they provide will be included. Although most operators embarking on the uniform rate option are likely to include all regulated tiers to maximize marketing and administrative savings, in some instances that might not be possible or sensible. For example, an operator might be interested in marketing a standardized "lifeline" BST at a uniform regional rate, but still maintain different rates for CPSTs with widely divergent program offerings. Another operator might be interested in marketing uniform BST and CPST rates, but still maintain different rates for

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[2] Cable operators electing the uniform regional rate option should not be foreclosed from offering promotional discounts on a more localized basis.

supplemental New Product Tiers. This bifurcated approach promises potential benefits, without any adverse consequences for consumers.

### F. Cable Operators Should Have Broad Discretion to Combine Communities With Varying Service Offerings In A Single Uniform Rate Zone.

In discussing the establishment of uniform regional rates, the *NPRM* presumes the existence of "uniform services." As a practical matter, a cable operator today is unlikely to offer identical services throughout an entire ADI. While this situation might change over time, current system constraints typically produce a significant variation in channel offerings across different portions of a given ADI. CR&B urges the Commission to accommodate this variation and **not** insist that systems have precisely the same line-up to be eligible for the uniform rate option.

As a practical matter, cable operators will **not** be interested in establishing a uniform rate for systems with widely divergent offerings. It would make little sense, after all, to market a 50 channel offering and a 20 channel offering for precisely the same price. Operators are likely to be interested in establishing a uniform rate only where the amount of regulated channels and related programming costs are reasonably similar.[3] CR&B submits

[3] As noted above, most cable operators are likely to limit use of the uniform rate option initially to cases where a single system provides identical services to multiple communities. Should the Commission find it difficult to resolve the additional issues posed by more complicated rate averaging, it should promptly authorize implementation of uniform rates for cases presenting this "simple" scenario.

that it would best be left to the operator to determine whether systems with different channel offerings should be marketed at a uniform rate.[4]

If the Commission feels compelled to place some limitation on operator discretion, CR&B suggests that the operator's aggregation decision be presumed reasonable as long as the amount of regulated channels and related programming costs vary by no more than 15% among affected communities. Although this could leave a subscriber in one community with more or less programming than a subscriber in another community paying precisely the same amount, that disparity often exists today. The modest accommodation proposed here would facilitate use of the uniform rate option in a host of cases where minor service disparities would otherwise preclude its application. These disparities typically reflect historic channel carriage patterns and may be attributable to differences in local must carry/black out requirements, copyright liability, or franchise commitments. To deny operators in these situations the benefits of the uniform rate option makes little sense. In fact, the Commission should promote the uniform rate option by considering waivers in cases involving greater than a 15% variation in program offerings, but the automatic 15% threshold would greatly reduce the Commission's administrative burden, as operators with greater service discrepancies are less likely to be interested in establishing a uniform rate.[5]

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[4] An operator could then advertise a uniform rate, along with the key programming components (*e.g.*, ESPN, CNN, Nickelodeon) common to all communities.

[5] Although maintaining a waiver option to the various rate regulation rules is critical, the Commission should acknowledge its difficulty in promptly resolving waiver requests and establish regulatory processes that minimize the need to file such requests.

### G. Cable Operators Should Have Broad Discretion To Determine Whether BST Rates Will Be Discounted In Establishing Uniform Rates.

The *NPRM* identifies two approaches to creates uniform regional rates. Both involve "blending" BST and CPST rates across the region, but the first option would require the operator to establish a BST rate equal to the lowest BST rate now in place and recapture any lost revenue by an offsetting increase in the average CPST rate. CR&B submits that neither alternative, **by itself**, is appropriate, because mandating one or the other would intrude unnecessarily on the operator's legitimate marketing decision-making. Moreover, the "best" rate mix will not necessarily result from either approach.[6] It makes far more sense to require an initial averaging of all rates, but then allow the operator to decide whether (and to what extent) it wishes to discount the BST rate and recover the resulting "loss" in BST revenue through higher CPST rates. As long as the rate adjustments to BST and CPST are performed in a "revenue neutral" fashion, the Commission should be indifferent as to whether the operator sets the uniform BST rate equal to its lowest existing BST rate, its average BST rate, or somewhere in between the existing and average BST rates.

Interestingly, the *NPRM* itself identifies the most appropriate mechanism for encouraging operators to establish reduced BST prices. It notes that "pre-approval of uniform

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[6] CR&B appreciates the Commission's interest in establishing reduced BST prices, but the current proposal to set the uniform BST rate equal to the lowest BST rate now in place is too blunt a tool to accomplish the task. In some cases, an operator might be willing to set a uniform BST rate beneath the lowest BST rate now in place, provided it could recover the lost revenue through increased CPST charges. In other cases, an operator might have an aberrationally low BST rate in a particular community that would be nonsensical on a widespread basis. And several major MSOs already have reduced their BST rates pursuant to a Social Contract. Requiring these operators to take a further BST reduction by moving to the lowest BST rate now in place would be inappropriate.

BST rates by franchising authorities generally will be unnecessary" if the BST rates "decrease or remain unchanged." *NPRM* at ¶ 18. Thus, operators already have an incentive under the existing regulatory framework to set a uniform BST rate low enough to minimize, or avoid altogether, the need for prior local approval. The closer the uniform BST is set to the lowest existing BST, the more likely it is that the operator can avoid the need for any prior approval.[7] The Commission should rely on this existing regulatory incentive and not further confine an operator's pricing discretion.

## III. THE COMMISSION SHOULD IMPLEMENT PROCEDURAL RULES THAT ALLOW FOR PROMPT IMPLEMENTATION OF UNIFORM RATES.

The *NPRM* seeks comments on "potential obstacles to the establishment of uniform rates," noting in particular the problem of "regulatory lag." *NPRM* at ¶ 24. CR&B supports the Commission's proposal that operators be allowed to proceed "expeditiously" with uniform rates, "subject to ultimate resolution in a later 'truing-up' process." *Id* at. ¶ 22. The Commission recently acknowledged the benefits of this approach in fashioning its "annual updating" procedures and Form 1240. The complications inherent to simultaneously coordinating rate changes in a number of communities makes this same "true-up" approach imperative here.

Without a true-up mechanism, cable operators pursuing the uniform rate option are likely to experience two key regulatory lag problems. First, some of the existing

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[7] CR&B presumes that the Commission would allow cable operators to increase CPST rates as part of their uniform rate implementation without securing prior FCC approval, regardless of the current status of CPST regulation. The process devised for "annual updating" of cable rates (*i.e.*, 30 days notice to the FCC and reimbursement of any overpayments through a true-up mechanism) should be applied in this context as well.

franchise-specific rates, upon which the uniform rate will be based, are likely to be under review at either the local or Commission level. Some of these rates may be under their initial review, and still others may be under appeal. Operators in these cases should be allowed to calculate their uniform rate based on whatever rate they believe to be justified. Any excess can be credited to subscribers through the true-up process once each case reaches a final determination.

Operators also could encounter regulatory lag in seeking approval from various regulatory authorities to implement a uniform rate proposal. As noted above, this problem would be ameliorated by the Commission clarifying that operators will **not** need prior approval from local franchising authorities if the BST rate is lowered in connection with uniform rate implementation. The Commission also should clarify that operators will **not** need prior approval for any related CPST rate changes. Finally, the Commission should eliminate the ability of local franchising authorities to toll a uniform rate change, much as it has already done in the context of the "annual updating" process. Establishing consistent procedures for "annual updating" and the establishment of uniform regional rates is particularly important, as operators are likely to implement both changes simultaneously.[8]

## IV. THE COMMISSION SHOULD DEVISE UNIFORM RATE RULES THAT ALLOW FOR THE SEPARATE PASS-THROUGH OF FRANCHISE-RELATED COSTS TO ENSURE LOCAL ACCOUNTABILITY.

The *NPRM* properly recognizes that the uniform rate option must provide for franchise-specific costs. Franchising authorities in a given region may, after all, impose very

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[8] The Commission should, however, allow an operator pursuing "annual updates," to make an additional intervening rate adjustment to establish uniform rates.

different franchise requirements that necessarily lead to very different franchise-related costs. A cable company might operate in one community under a simple agreement calling for nothing more than a 1% franchise fee, and it might operate in an adjacent community under a detailed agreement calling for multiple PEG channels, substantial PEG support (operational and capital), and a 5% franchise fee. An operator might choose to establish a single, all-inclusive rate for both communities for marketing purposes, but it should not be required to do so. Such a requirement would undermine local accountability.[9]

In its effort "to ensure that the uniform rate proposal does not allow franchise-specific costs to be shifted from one community to another," the Commission proposes "to permit the cable operator simply to itemize and charge for franchise-related costs outside the uniform rate-setting formula." *NPRM* at ¶ 24. CR&B shares the Commission's desire to ensure that local franchising authorities remain accountable for franchise-related costs and fully supports the proposed "itemization" solution.

The current proposal builds on the existing regulatory treatment of franchise fees, which already are calculated separately from, and then added to, the base rate. Operators proceeding under the uniform rate option would be permitted to back-out **all** franchise-related costs (rather than simply franchise-fees) already included in their existing rates and then add them back on a franchise-specific basis.[10] The operator would then be

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[9] *See generally, Report and Order*, MM Docket No. 92-266, at ¶ 546 (discussing need to ensure local accountability of franchise-related costs, including "per channel costs for the number of channels used to meet franchise requirements.")

[10] In many cases, an operator might be willing to leave existing franchise related costs in the uniform rate base, but preserve the right to pass-through future increases in such costs on a franchise-specific basis. This approach would ensure local political accountability in future

allowed to advertise its "core" rate, with an explanation that the rate is subject to additional franchise-related costs. This marketing treatment would be consistent with the advertising rules the Commission devised in the *Third Order on Reconsideration,* MM Docket Nos. 92-266, 92-262, FCC 94-40, at ¶ 143 (March 30, 1994), for systems covering "multiple franchise areas that have different franchise fees or other franchise costs, different channel line-ups, or have slightly different rate structures." The *Third Order on Reconsideration* provides that "[i]n such circumstances, an operator can advertise a range of fees, or a fee plus rate that indicates the core rate plus the range of possible additions, based on the particular location of the subscriber." *Id.* The Commission recently revisited and affirmed this flexible advertising policy in the *Thirteen Order on Reconsideration.* It noted, "We find that the 'fee plus' approach provides operators that cover multiple franchise areas the flexibility to efficiently advertise their services to consumers." *Thirteenth Order on Reconsideration, supra,* at ¶ 146.

The *NPRM* specifically asks how the Commission should address the lack of a uniform channel line-up resulting from different PEG channel obligations. *NPRM* at ¶ 23. Accounting for franchise-specific variations in the context of PEG channels is somewhat more complicated than other franchise-specific costs. As explained above, CR&B does not believe that minor channel variations should foreclose use of the uniform rate option. Precluding participation would be even more disconcerting where the channel variation is attributable solely to a variation in franchise-mandated PEG access obligations (which are largely outside

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franchise negotiations, but minimize current accounting and political hurdles. This, too, is an area where an operator should have discretion to select the most appropriate option: (1) establishing a single, uniform rate; (2) establishing a single, uniform rate, but passing-through future increases in franchise-related costs on a franchise-specific basis; or (3) backing-out all franchise-related costs and adding them back on a franchise-specific basis.

the operator's control). But the need for local political accountability requires that operators be allowed to vary local pricing to reflect variations in PEG channel obligations. Although a precise calculation could become very difficult, a relative simple methodology is available that would be reasonably consistent with the existing regulatory framework.

The first step would be to calculate a base uniform rate **excluding** PEG access channels and the costs reasonably attributable to those channels. Total available channels would be reduced by existing PEG channels and total revenue would be reduced by PEG revenue (based on the average channel "residual"). The resulting "per channel" figure would be the basis for calculating the "core" uniform rate. The operator would then add back to this core rate its PEG channel costs (again, based on the average channel "residual"), depending on how many PEG channels were required in a particular community. This process would produce a core uniform rate applicable where there were no PEG channel requirements, and establish the appropriate "add-on" for communities with PEG channel requirements.[11]

## V. THE COMMISSION SHOULD ALLOW FOR THE ESTABLISHMENT OF UNIFORM REGIONAL EQUIPMENT RATES.

Although the *NPRM* focuses on uniform service rates, it also seeks comment on how equipment rates should be calculated. The Commission has previously acknowledged that Section 623(b)(3), requiring that cable equipment and installation rates be set at "actual cost," does not mandate that these costs be calculated on a franchise-specific basis. *Second Order on Reconsideration*, 9 FCC Rcd. 4119 at n. 302. The Commission has

[11] An operator should have option of spreading PEG channel costs among all communities that receive the access channel or loading all the costs onto the particular community that expressly required the access channels.

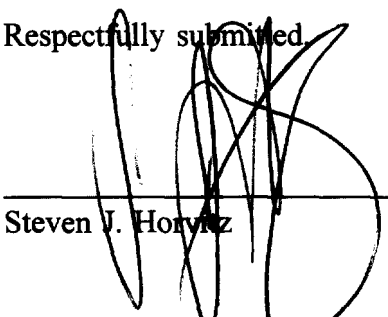
also ruled that the "actual cost" calculation should be made "at either the franchise, system, regional, or company level in a manner consistent with practices of the operator as of April 3, 1992. *First Reconsideration Order*, 9 FCC Rcd. 1164 at ¶5 and n. 96 (1993); 47 C.F.R. § 76.924(c). Given prevailing accounting practices, this ruling means that most equipment cost calculations are already being performed on a non-franchise-specific basis. Finally, in agreeing to social contracts with Continental Cablevision and Time-Warner, the Commission expressly authorized the establishment of regional equipment and installation rates (regardless of past accounting practices). The Commission explained, "[E]quipment averaging will minimize drastic increases in rates for subscribers as upgrades take place and will reduce the administrative burdens on [the operator] to prepare rates on a franchise-by franchise basis." *Time Warner Social Contract,* FCC 95-478 at ¶ 40 (Nov. 30, 1995). The same reasons that equipment averaging makes sense for these two large cable operators apply equally to the rest of the cable industry. In any event, the Telecommunications Act of 1996 expressly authorizes the flexibility in equipment pricing proposed here. 47 U.S.C. § 543(a)(9)(A). The Commission should promptly adopt any regulation necessary to effectuate this Congressional mandate.

In authorizing the establishment of uniform equipment rates, the Commission should clarify that the regional zone for uniform equipment rates need not coincide with the regional zone for uniform service rates. Different considerations (including variations in past accounting treatment and current services and equipment) may warrant establishing very different regions for uniform service rates and uniform equipment rates.

## CONCLUSION

For the foregoing reasons, Cole, Raywid & Braverman respectfully requests that the Commission modify its existing cable rate regulations to facilitate the establishment of uniform regional rates in a manner that will accommodate a wide variety of factual scenarios, respect operators' legitimate marketing discretion, and promote local accountability for franchise-mandated costs.

Respectfully submitted,



Steven J. Horvitz

**COLE, RAYWID & BRAVERMAN**
Suite 200
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-3458
202/659-9750

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# Attachment A

Charter Communications, Inc.
Greater Media, Inc.
Marcus Cable Partners, L.P.

Colorado Cable Television Association
Cable Television Association of Georgia
Indiana Cable Television Association
Cable Television Association of Maryland, Delaware and the District of Columbia
Michigan Cable Telecommunications Association
South Carolina Cable Television Association
Tennessee Cable Television Association
Wisconsin Cable Communications Association